Supreme Court, U.S.
FILED
NOV 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-275

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

COOTER & GELL,

Petitioner,

—v.—

HARTMARX CORPORATION, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF PETITIONER COOTER & GELL

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES iii

THE INTEREST OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA 1

SUMMARY OF ARGUMENT 2

ARGUMENT 6

I. A RULE 41(a)(1)(i) VOLUNTARY DISMISSAL DEPRIVES THE COURT OF POWER TO IMPOSE RULE 11 SANCTIONS 6

A. A Rule 11 Exception to Rule 41(a)(1) Would Be Counterproductive 6

B. Creation of a Rule 11 Exception To Rule 41(a)(1) Is Unnecessary 8

C. Defendants Can Procedurally Protect Themselves Absent a Rule 11 Exception to Rule 41(a)(1) 10

D. Approval of Post-Dismissal Sanctions Will Necessarily Entail Allowing Post-Judgment Awards and Foster Piecemeal Appeals..... 10

II. THE ABUSE OF DISCRETION STANDARD, INCLUDING CAREFUL MONITORING OF LEGAL ERROR, SHOULD GOVERN REVIEW OF ALL ASPECTS OF A RULE 11 ORDER 13

III. RULE 11 CONFERS NO AUTHORITY TO IMPOSE SANCTIONS ON APPEAL 15

PAGE

A. Under Traditional Rules of Statutory Construction, Rule 11 Defers to Section 1912 and Appellate Rule 38 15

B. There Is No Need to Apply Rule 11 on Appeal 18

C. To Construe Rule 11 As Mandating Fee-Shifting on Appeal Would Violate the Rules Enabling Act 20

D. The Court of Appeals' Automatic Attorneys' Fee Analysis Misconstrues Rule 11 ... 23

E. The Court of Appeals' Construction of Rule 11 Is Manifestly Unfair 24

CONCLUSION 26

TABLE OF AUTHORITIES

Cases: PAGE

Adduono v. World Hockey Ass'n, 824 F.2d 617 (8th Cir. 1987) 9 n.2

Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975) 5, 21, 22

Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp., 843 F.2d 808 (4th Cir. 1988) 15 n.7

Boddie v. Connecticut, 401 U.S. 371 (1971) 24

Braley v. Campbell, 832 F.2d 1504 (10th Cir. 1987) 16, 19 n.9

Brown v. Federation of State Medical Bds., 830 F.2d 1429 (7th Cir. 1987) 14 n.6

Burkhart v. Kinsley Bank, 852 F.2d 512 (10th Cir. 1988) 13

Burlington N. R.R. v. Woods, 480 U.S. 1 (1987) 16, 17, 22 n.15

Cheek v. Doe, 828 F.2d 395 (7th Cir.), *cert. denied*, 484 U.S. 955 (1987) 23 n.18

Church of Scientology of Cal. v. IRS, 792 F.2d 153 (D.C. Cir. 1986) (en banc), *aff'd*, 484 U.S. 9 (1987) 15

Commercial Wholesalers, Inc. v. Investors Commercial Corp., 172 F.2d 800 (9th Cir. 1949) 16

Cotner v. Hopkins, 795 F.2d 900 (10th Cir. 1986) 24 n.22

Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987) 17

Danik, Inc. v. Hartmarx Corp., 875 F.2d 890 (D.C. Cir.), *cert. granted*, 110 S.Ct. 275 (1989) .....*passim*

PAGE

Donaldson v. Clark, 819 F.2d 1551 (11th Cir. 1987) (en banc) 7, 14, 23 n.21

EEOC v. Milavetz & Assocs., P.A., 863 F.2d 613 (8th Cir. 1988) 14

Eastway Constr. Corp. v. City of New York, 762 F.2d 243 (2d Cir. 1985) 14

Erie R.R. v. Tompkins, 304 U.S. 64 (1938) 22

Ford v. Temple Hosp., 790 F.2d 342 (3d Cir. 1986) 19

Foss v. Federal Intermediate Credit Bank, 808 F.2d 657 (8th Cir. 1986) 6

Fred A. Smith Lumber Co. v. Edidin, 845 F.2d 750 (7th Cir. 1988) 7

Gaiardo v. Ethyl Corp., 835 F.2d 479 (3d Cir. 1987) 23 n.20

Gelco Corp. v. Baker Indus., Inc., 779 F.2d 26 (8th Cir. 1985) 19

Gordon v. Heimann, 715 F.2d 531 (11th Cir. 1983) 9

Hagerty v. Succession of Clement, 749 F.2d 217 (5th Cir. 1984), *cert. denied*, 474 U.S. 968 (1985) 19 n.9

Harris v. Marsh, 679 F. Supp. 1204 (E.D.N.C. 1987), *appeal docketed*, No. 88-1364 (4th Cir. 1988) 7

Hays v. Sony Corp. of Am., 847 F.2d 412 (7th Cir. 1988) 9 n.3

Herzfeld & Stern v. Blair, 769 F.2d 645 (10th Cir. 1985) 18

Hicks v. Southern Md. Health Sys. Agency, 805 F.2d 1165 (4th Cir. 1986) 11

Hudson v. Moore Business Forms, Inc., 836 F.2d 1156 (9th Cir. 1987) 25

INVST Fin. Group, Inc. v. Chem-Nuclear Sys., 815 F.2d 391 (6th Cir.), *cert. denied*, 484 U.S. 927 (1987) 14 n.6

PAGE

In re Ginther, 791 F.2d 1151 (5th Cir. 1986) 18

In re Jeannette Corp., 832 F.2d 43 (3d Cir. 1987) 11

In re Kelly, 808 F.2d 549 (7th Cir. 1986) 23 n.16

In re Kelly, 841 F.2d 908 (9th Cir. 1988) 19

In re Midland United Co., 141 F.2d 692 (3d Cir. 1944) 15

In re Ruben, 825 F.2d 977 (6th Cir. 1987), *cert. denied*, 108 S.Ct. 1108 (1988) 11, 19

International Brotherhood of Teamsters (Airline Div.) v. Ass'n of Flight Attendants, 864 F.2d 173 (D.C. Cir. 1988) 14

Jackson v. Law Firm of O'Hara, Ruberg, Osborne & Taylor, 875 F.2d 1224 (6th Cir. 1989) 7

Jensen Elec. Co. v. Moore, Caldwell, Rowland & Dodd, Inc., 873 F.2d 1327 (9th Cir. 1989) 11

Johnson Chem. Co. v. Home Care Prods., Inc., 823 F.2d 28 (2d Cir. 1987) 6

Kale v. Combined Ins. Co. of Am., 861 F.2d 746 (1st Cir. 1988) 13

Kucel v. Walter E. Heller & Co., 813 F.2d 67 (5th Cir. 1987) 25

Langham-Hill Petroleum, Inc. v. Southern Fuels Co., 813 F.2d 1327 (4th Cir. 1987), *cert. denied*, 484 U.S. 829 (1987) 11

LeFebvre v. Commissioner, 830 F.2d 417 (1st Cir. 1987) 16

Lindsey v. Normet, 405 U.S. 56 (1972) 26

Link v. Wabash R.R., 370 U.S. 626 (1962) 9 n.3

Local 106, Serv. Employees Int'l Union v. Homewood Memorial Gardens, Inc., 838 F.2d 958 (7th Cir. 1988) 13 n.5

PAGE

Mars Steel Corp. v. Continental Bank, N.A., 880 F.2d 928 (7th Cir. 1989) 13

Mary Ann Pensiero, Inc. v. Lingle, 847 F.2d 90 (3d Cir. 1988) 11, 12

McGoldrick Oil Co. v. Campbell, Athey & Zukowski, 793 F.2d 649 (5th Cir. 1986) 9 n.3, 23 n.19

Mihalik v. Pro Arts, Inc., 851 F.2d 790 (6th Cir. 1988) 13

Natasha, Inc. v. Evita Marine Charters, Inc., 763 F.2d 468 (1st Cir. 1985) 16

National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976) 8

Obin v. District No. 9, Int'l Ass'n of Machinists & Aerospace Workers, 651 F.2d 574 (8th Cir. 1981) 9 n.2

Parent's Ass'n. of P.S. 16 v. Quinones, 803 F.2d 1235 (2d Cir. 1986) 15 n.7

Pony Express Courier Corp. of Am. v. Pony Express Delivery Serv., 872 F.2d 317 (9th Cir. 1989) 24

Port Drum Co. v. Umphrey, 852 F.2d 148 (5th Cir. 1988) 9 n.2

Radzanower v. Touche, Ross & Co., 426 U.S. 148 (1976) 17

Reliance Ins. Co. v. Sweeney Corp., 792 F.2d 1137 (D.C. Cir. 1986) 18

Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980) .. 18 n.8, 19, 21 n.12

Rolleston v. Eldridge, 848 F.2d 163 (11th Cir. 1988) ... 13

Rossman v. State Farm Mut. Auto Ins. Co., 832 F.2d 282 (4th Cir. 1987) 7

SEC v. Carter Hawley Hale Stores, Inc., 760 F.2d 945 (9th Cir. 1985) 15 n.7

PAGE

Santiago v. Victim Servs. Agency of Metro. Assistance Corp., 753 F.2d 219 (2d Cir. 1985) 6

Smith v. Detroit Fed'n of Teachers, 829 F.2d 1370 (6th Cir. 1987) 19 n.9

Snow Machines, Inc. v. Hedco, Inc., 838 F.2d 718 (3d Cir. 1988) 14

Societe Internationale v. Rogers, 357 U.S. 197 (1958) .. 20

Spiegel v. Continental Illinois Nat'l Bank, 790 F.2d 638 (7th Cir.), *cert. denied*, 479 U.S. 987 (1986) 16

Steinle v. Warren, 765 F.2d 95 (7th Cir. 1985) 9 n.3

Stevens v. City of Brockton, 676 F. Supp. 26 (D. Mass. 1987) 23 n.17

Szabo Food Serv. v. Canteen Corp., 823 F.2d 1073 (7th Cir. 1987), *cert. dism'd*, 108 S.Ct. 1101 (1988) 8

Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866 (5th Cir. 1988) 13, 14 n.6

Thorp v. Scarne, 599 F.2d 1169 (2d Cir. 1979) 6

Townsend v. Holman Consulting Corp., 881 F.2d 788 (9th Cir. 1989) 13 n.5

Trident Center v. Connecticut Gen. Life Ins. Co., 847 F.2d 564 (9th Cir. 1988) 25

United States v. Carley, 783 F.2d 341 (2d Cir.), *cert. denied*, 476 U.S. 1142 (1986) 16

United States v. Stillwell, 810 F.2d 135 (7th Cir. 1987) . 19

Warren v. Reserve Fund, Inc., 728 F.2d 741 (5th Cir. 1984) 19

Westmoreland v. CBS, Inc., 770 F.2d 1168 (D.C. Cir. 1985) 5, 25

PAGE

White v. New Hampshire Dep't of Employment Sec., 455 U.S. 445 (1982) 11

Zaldivar v. City of Los Angeles, 780 F.2d 823 (9th Cir. 1986) 13

Zarowitz v. BankAmerica Corp., 866 F.2d 1164 (9th Cir. 1989) 18

Statutes:

28 U.S.C. § 1821 17

28 U.S.C. § 1912 ..... 4, 15

28 U.S.C. § 1920 17

28 U.S.C. § 1927 ..... *passim*

28 U.S.C. § 2072 ..... 5, 20

42 U.S.C. § 1988 11

Rules:

Fed. R. App. P. 38 ..... *passim*

Fed. R. App. P. 46(c) ..... *passim*

Fed. R. Civ. P. 1 ..... 4, 16

Fed. R. Civ. P. 11 ..... *passim*

Fed. R. Civ. P. 12(b)(6) 3, 10

Fed. R. Civ. P. 12(c) 3

Fed. R. Civ. P. 41(a) ..... *passim*

Fed. R. Civ. P. 52 ..... 14 n.6

Fed. R. Civ. P. 53(c) 8 n.1

Fed. R. Civ. P. 54 ..... 11, 17

PAGE

Fed. R. Civ. P. 56 11

Fed. R. Civ. P. 81 ..... 4, 16

Fed. R. Civ. P. 82 16

Sup. Ct. R. 36.2 1

1st Cir. R. 30.8 ..... 19 n.10

2d Cir. R. 38 ..... 19 n.10

2d Cir. Civ. App. Mgmt. Plan R. 7 ..... 19 n.10

3d Cir. R. 20(4) 19 n.10

3d Cir. R. 27(1) 12 n.4

4th Cir. R. 30 ..... 19 n.10

5th Cir. R. 42.2 ..... 19 n.10

5th Cir. R. 47.8 ..... 12 n.4

6th Cir. R. 11(1) 19 n.10

6th Cir. Internal Op. R. 17 ..... 12 n.4

8th Cir. R. 16(e) 19 n.10

8th Cir. R. 17 ..... 12 n.4

9th Cir. R. 28-2.3 ..... 12 n.4

9th Cir. R. 39-1.6 ..... 12 n.4

11th Cir. R. 42-2 ..... 19 n.10

D.C. Cir. R. 23 19

S.D. Ala. R. 28(a)-(b) 12 n.4

M.D. Ala. R. 20(a)-(b) 12 n.4

D. Ala. Gen. R. 21.1 ..... 12 n.4

E.D. Ark. R. 27 ..... 12 n.4

PAGE

W.D. Ark. R. 27(a)-(b) & (d) 12 n.4

N.D. Cal. R. 270 ..... 12 n.4

E.D. Cal. R. 293(a) 12 n.4

D. Del. R. 6.3 ..... 12 n.4

D.D.C. R. 215 ..... 12 n.4

N.D. Ga. R. 270 ..... 12 n.4

S.D. Ga. R. 11 ..... 12 n.4

D. Idaho R. 11-107(a) 12 n.4

N.D. Ill. Gen. R. 46 ..... 12 n.4

N.D. Ind. R. 43 ..... 12 n.4

N.D. Iowa R. 2.9 ..... 12 n.4

S.D. Iowa R. 2.9 ..... 12 n.4

D. Kan. R. 220 ..... 12 n.4

E.D. Ky. R. 14(a) 12 n.4

W.D. Ky. R. 14(a) 12 n.4

D. Me. R. 32 ..... 12 n.4

D. Md. R. 234 ..... 12 n.4

D. Mass. R. 27 ..... 12 n.4

D. Minn. R. 6 ..... 12 n.4

N.D. Miss. R. 15(b)(1) 12 n.4

S.D. Miss. R. 15(b)(1) 12 n.4

D. Nev. R. 205-18 ..... 12 n.4

D.N.H. R. 39 ..... 12 n.4

PAGE

D.N.M. R. 15(f) 12 n.4

M.D.N.C. R. 210 ..... 12 n.4

E.D.N.C. R. 29.00 ..... 12 n.4

E.D.N.C. R. 29.01 ..... 12 n.4

D.N.D. R. 15(f) 12 n.4

N.D. Okla. R. 6(f) 12 n.4

W.D. Okla. R. 6(e) 12 n.4

E.D. Okla. R. 6(f) 12 n.4

D. Or. R. 265-4 ..... 12 n.4

W.D. Pa. R. 33 ..... 12 n.4

D.P.R. R. 332 ..... 12 n.4

D.R.I. R. 25(3) 12 n.4

D.S.C. R. 16.00 ..... 12 n.4

M.D. Tenn. R. 13(e) 12 n.4

W.D. Tex. R. 300-10 ..... 12 n.4

N.D. Tex. R. 12.1 ..... 12 n.4

E.D. Va. R. 11(L) 12 n.4

E.D. Wis. R. 9 ..... 12 n.4

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PAGE

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AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF PETITIONER COOTER & GELL

Pursuant to Rule 36.2 of this Court and with the written consent of the parties, the Association of Trial Lawyers of America ("ATLA") submits this brief as *amicus curiae* in support of Petitioner Cooter & Gell.

THE INTEREST OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA

ATLA is a national bar association of approximately 60,000 litigators who primarily represent plaintiffs in suits for tortious

misconduct in the personal injury, civil rights and commercial fields. Rule 11 is a source of particular concern to ATLA, as the recognized representative of plaintiffs' lawyers, because sanctions under the Rule have been levied disproportionately against plaintiffs and their counsel. *See* Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 200 (1988); Burbank, *Rule 11 in Transition: The Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11* 65 (Am. Judic. Soc'y 1989) ("*Third Circuit Task Force Rep't*"); *see also* Willging, *The Rule 11 Sanctioning Process* 75 (Fed. Jud. Ctr. 1988). Accordingly, ATLA has a special interest in the law developing under Rule 11 and in the issues raised by this case.

SUMMARY OF ARGUMENT

Issue No. 1. Whether jurisdiction exists to impose Rule 11 sanctions following a plaintiff's voluntary dismissal pursuant to Fed. R. Civ. P. 41(a)(1)(i).

Rule 11 sanctions should not be imposable following a Rule 41(a)(1) voluntary dismissal for four reasons:

(a) Purpose. The expressly stated purpose of Rule 11 is deterrent, not punitive nor compensatory. The Rule, according to its drafters, is designed to "reduce frivolous claims, defenses or motions. . . ." 97 F.R.D. 190, 192 (1983). This purpose is satisfied by encouraging voluntary dismissal of claims under Rule 41(a)(1), and it is frustrated by constraining plaintiffs to continue to litigate claims in an effort to demonstrate their bona fides or merits. As a practical matter, the decision below will inhibit Rule 41(a)(1) dismissals and promote litigation in marginal cases because of plaintiffs' rational apprehension that a dismissal itself will become evidence that the dismissed claim was sanctionable.

(b) Redundancy. Plaintiffs do not start lawsuits in order to dismiss them under Rule 41(a)(1). If they do, defendants have other remedies available to them, ranging from causes of action for wrongful civil litigation to independent statutory claims. Since there is no evidence that the drafters intended to carve a

Rule 11 exception into Rule 41(a), there is no warrant, much less any need, to interpret Rule 41(a) as permitting redundant Rule 11 sanctions.

(c) Procedural Needlessness. A defendant can preserve a Rule 11 sanctions motions by the simple expedient of filing an answer. The instant case, for example, arises only because respondent consciously chose not to file a general denial together with a Rule 12(c) motion for judgment on the pleadings, electing instead to file a voluminous Rule 12(b)(6) motion. The Rule 12(b)(6) motion offered no procedural advantages over the Rule 12(c) alternative (the motions could have been substantively identical) and left the Rule 41(a)(1) dismissal route open to the plaintiff. The Rules afford defendants this choice, and the selection of the 12(b)(6) alternative in any particular case does not reflect any defect in the Rules necessitating a creative reinterpretation of Rule 41(a)(1).

(d) Piecemeal Appeals. If a Rule 41(a) dismissal does not end plaintiffs' exposure to Rule 11 sanctions, then there is no reason why entry of judgment or filing a notice of appeal should be deemed to do so, and several circuits following the lower court's approach have so ruled. An affirmance in this case therefore presents the serious risk of promoting piecemeal appeals—one appeal on the merits following judgment, a second on the post-judgment sanctions decision. At the very least, if the lower court's decision is sustained, this Court should direct that sanctions may be imposed only where, as in this case, a motion for sanctions antedates entry of judgment and only when, unlike this case, the award is rendered within a prescribed period of time (e.g., 30 to 90 days) after judgment has been entered.

Issue No. 2. Whether review of Rule 11 sanctions under an abuse-of-discretion standard is appropriate.

The circuits are split as to whether a district judge's legal determination that Rule 11 has been violated should be reviewed under the abuse-of-discretion standard or should be afforded *de novo* review. In deciding between these standards,

the Court is urged to bear in mind the principal problem posed by Rule 11 to practitioners—that, while sanctions are mandatory, the standards for imposing sanctions are highly uncertain, fluctuating from district to district and judge to judge. *See, e.g.*, ABA Section of Litigation, *Standards and Guidelines for Practice Under Rule 11 of the Federal Rules of Civil Procedure*, 121 F.R.D. 101, 104 (1988) ("ABA Standards"). If the abuse-of-discretion standard is endorsed by this Court, it should be coupled with an admonition about the need for careful appellate review of legal issues in Rule 11 cases and an express endorsement of the familiar doctrine that the application of an incorrect legal standard in imposing a sanction constitutes an abuse of discretion *per se*.

Issue No. 3. Whether a court of appeals can automatically impose Rule 11 sanctions for an appeal upon affirmance of a Rule 11 award.

A Rule 11 attorneys' fees award should not automatically be imposed upon affirmance of a Rule 11 sanction for five reasons:

(a) Statutory Construction. Rule 11, by its terms, has no application to proceedings on appeal. It applies only to proceedings in federal district court. *See* Fed. R. Civ. P. 1, 81. Rather, Congress has enacted a sanctions statute (28 U.S.C. § 1912 ("Section 1912")) and this Court has promulgated a rule based on that statute (Fed. R. App. P. 38 ("Appellate Rule 38")) that are specifically tailored to the appellate process and govern when sanctions may appropriately issue on appeal. There is no evidence that, in adopting Rule 11, the drafters of the Rule, or this Court as ultimate promulgating authority, ever intended to displace Section 1912 or Appellate Rule 38. Under traditional rules of statutory construction, Rule 11's broad, non-specific, district-court sanctioning power cannot be read to supersede the narrow, specific, appellate sanctioning power set forth in Section 1912 and Appellate Rule 38.

(b) Redundancy. Six separate sources of power currently authorize sanctions on appeal: Section 1912, Appellate Rule 38, 28 U.S.C. § 1927 ("Section 1927"), inherent judicial power, Fed. R. App. P. 46(c) ("Appellate Rule 46(c)") and local circuit court rules. All of these powers are discretionary. All authorize sanctions only for frivolous appeals. In light of the availability of these alternate remedies, it is unnecessary to construe Rule 11—with its dramatically different standard of liability—to furnish a sanctioning power on appeal.

(c) Rules Enabling Act. Were Rule 11 construed as requiring the automatic imposition of monetary sanctions upon affirmance of a Rule 11 award, the Rule would violate the Rules Enabling Act, 28 U.S.C. § 2072, because it would encroach in an area—mandatory fee-shifting—reserved to Congress. The American Rule requiring each litigant to bear his or her own attorneys' fees "is deeply rooted in our history and in congressional policy; and it is not for [this Court] to invade the legislature's province by redistributing litigation costs"—except in limited, historically precedented circumstances, none of which is applicable in this case. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 271 (1975); *see also id.* at 257-259 & n. 31. Rule 11 should be construed to avoid this conflict with the Rules Enabling Act.

(d) Misconstruction. Even if Rule 11 did apply to appellate proceedings, it would not, by its terms, produce the automatic fee-shifting result reached below.

(e) Fairness. The rule enunciated by the Court of Appeals is unfair in at least two respects. First, it erects a financial impediment to sanctioned persons' appealing Rule 11 orders because it confronts them with the potentially daunting prospect of paying not one but two sets of attorneys' fees should they lose their appeal, even if (as in this case) the appeal is not frivolous. This is particularly bad public policy in an ambiguous, unsettled area of law, like Rule 11, where appellate court guidance is needed most.

Second, as the court below recognized, the rationale underlying the automatic imposition of attorneys' fees upon affirmance of a Rule 11 award equally mandates an award of fees in favor of any party who wins a reversal of a denial of a sanctions

motion. *See Danik, Inc. v. Hartmarx Corp.*, 875 F.2d 890, 897 (D.C. Cir. 1989) (relying on *Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1179-80 (D.C. Cir. 1985)). Consequently, the decision below not only discourages Rule 11 appeals when brought by sanctioned persons but, conversely, encourages them when brought by unsuccessful movants for sanctions. This disparity of treatment is incongruous and unfair.

ARGUMENT

I. A RULE 41(a)(1)(i) VOLUNTARY DISMISSAL DEPRIVES THE COURT OF POWER TO IMPOSE RULE 11 SANCTIONS

The parties' submissions will doubtless consider in detail the history and import of Rule 41(a)(1) and seek to reconcile it with the operation of Rule 11. It is ATLA's view that the Second Circuit correctly stated the law in *Johnson Chemical Co., Inc. v. Home Care Prods., Inc.*, 823 F.2d 28, 31 (2d Cir. 1987), in which it held that, once a Rule 41(a)(1)(i) dismissal is filed, the district court "los[es] all jurisdiction over the action" so that a subsequent Rule 11 order is "a nullity." *Accord Foss v. Federal Intermediate Credit Bank*, 808 F.2d 657, 660 (8th Cir. 1986); *see also Santiago v. Victim Servs. Agency of Metro. Assistance Corp.*, 753 F.2d 219, 221-22 (2d Cir. 1985); *Thorp v. Scarne*, 599 F.2d 1169, 1173, 1175-76 (2d Cir. 1979).

There is no evidence that Rule 11 was intended to create an exception to the bright line test set forth in Rule 41(a)(1). It should not be deemed to do so, ATLA submits, in light of the purpose of Rule 11, the availability of alternate remedies, the realities of litigation practice, and the significant risk of otherwise promoting piecemeal appeals.

A. A Rule 11 Exception to Rule 41(a)(1) Would Be Counterproductive

There is nothing mysterious about the purpose of Rule 11. The Rule is intended to "reduce frivolous claims, defenses or motions" and thus to deter "costly meritless maneu-

vers. . . ." *See* 97 F.R.D. 190, 192 (1983) (letter from Judge Walter Mansfield, Chairman of the Advisory Committee on Civil Rules, transmitting amended Rule 11 to the Judicial Conference Committee on Rules of Practice and Procedure). The Rule is designed to "discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses." Adv. Com. Note (1983) to Fed. R. Civ. P. 11.

It is specific deterrence—deterrence of the person sanctioned—that is the primary goal of the Rule. Punishment and compensation, as such, are not purposes which Rule 11 was designed to serve. Those are, at best, secondary considerations. *See, e.g., Jackson v. Law Firm of O'Hara, Ruberg, Osborne & Taylor*, 875 F.2d 1224, 1229 (6th Cir. 1989) ("deterrence, not compensation, is the principal goal of Rule 11"); *Fred A. Smith Lumber Co. v. Edidin*, 845 F.2d 750, 752 (7th Cir. 1988) ("The most important purpose of Rule 11 sanctions is to deter frivolous litigation and the abusive practices of attorneys"); *Donaldson v. Clark*, 819 F.2d 1551, 1556 (11th Cir. 1987) (en banc) ("the imposition of sanctions pursuant to Rule 11 is meant to deter attorneys from violating the rule"); *Third Circuit Task Force Rep't* at 96 ("Deterrence of abuse by the person sanctioned (specific deterrence) should be regarded as Rule 11's most important goal, and courts should pursue other goals only to the extent necessary or appropriate to attainment of specific deterrence. Compensation should be regarded as one (among many) means to the end of deterrence, not as an end in itself").

The filing of a Rule 41(a)(1) dismissal by a plaintiff satisfies the purpose of specific deterrence. All claims are not merely reduced but withdrawn in full; the threat of meritless maneuvers and dilatory or abusive tactics is ended; and the litigation process has thereby been streamlined. There is no need to read into Rule 41(a)(1) an implicit Rule 11 exception. Rule 11 has served its purpose.

If the contrary rule, adopted below, is affirmed, plaintiffs will be loath to dismiss actions for fear that the dismissal in itself will be used as evidence in the Rule 11 proceedings against them. This is not an idle concern. *See, e.g., Harris v. Marsh*, 679 F. Supp. 1204, 1387-88 (E.D.N.C. 1987), *appeal docketed*,

No. 88-1364 (4th Cir. 1988); *see also Rossman v. State Farm Mut. Auto Ins. Co.*, 832 F.2d 282, 289-90 (4th Cir. 1987). Under the rule articulated below, if the plaintiff does not dismiss, or even if he[1] does, the case will continue to linger on the court's docket and receive additional, unnecessary and perhaps (as in this case) substantial, time and effort by court and counsel.

Even if a Rule 41(a)(1) dismissal were filed to avoid Rule 11 sanctions, the dismissal would serve Rule 11's purposes. This Court has characterized dismissal with prejudice, as a sanction for litigation misconduct, to be "extreme"—"the most severe in the spectrum of sanctions provided by statute or rule. . . ." *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643 (1976). By voluntarily electing to dismiss an action pursuant to Rule 41(a), a plaintiff self-inflicts a sanction of penultimate severity (dismissal without prejudice), precludes the possibility of additional judicial resources being expended on the claim (however viable it may be) and relieves the defendant of the burden of proceeding with a defense. That is a result sought by Rule 11. In an era of clogged dockets, that result should be encouraged and should not subject the plaintiff to the threat of further sanctions pursuant to Rule 11.

B. Creation of a Rule 11 Exception To Rule 41(a)(1) Is Unnecessary

It is a rare plaintiff who starts a lawsuit with the intention of dismissing it under Rule 41(a)(l). Plaintiffs start lawsuits to obtain judicial relief. If one should start a lawsuit in bad faith with no intention of pursuing it, the defendant has a common law remedy: an independent action for either malicious prosecution or abuse of process, or both. *See generally* Restatement 2d, *Torts* §§ 674, 682 (1977); Prosser & Keeton, *Torts* §§ 120-121 (5th ed. 1984); Harper, James & Gray, *Torts* §§ 4.8-4.9 (2d ed. 1986).

1 To facilitate readability, gender neutrality is sometimes abandoned in the text. *Cf.* Fed. R. Civ. P. 53(c) (repeating the same noun six times in first three sentences for want of a pronoun).

The adequacy of these alternate remedies is highlighted by the Rule 11 decisions emphasizing that Rule 11 does no more than effectively incorporate, and subject offending counsel to sanctions for, committing precisely these torts. *See, e.g., Szabo Food Serv. v. Canteen Corp.*, 823 F.2d 1073, 1083 (7th Cir. 1987), *cert. dism'd*, 108 S.Ct. 1101 (1988) (Rule 11 "effectively picks up the torts of abuse of process (filing an objectively frivolous suit) and malicious prosecution (filing a colorable suit for the purpose of imposing expense on the [opposing party] rather than for the purpose of winning)"). Since Rule 11 provides merely one procedural mechanism for remedying these torts, even without it defendants have their common law remedies.

An aggrieved defendant's alternate remedies are not limited to common law causes of action for wrongful civil litigation. He or she also has an independent cause of action under 28 U.S.C. § 1927 to recover attorneys' fees against any plaintiff's lawyer who so multiplies the proceedings in a case unreasonably and vexatiously as to generate excess costs, expenses and attorneys' fees. *See Gordon v. Heimann*, 715 F.2d 531, 534 (11th Cir. 1983).[2] An aggrieved defendant, therefore, is not remedyless regardless of whether a Rule 11 exception is read into Rule 41(a)(1).[3]

2 Rule 11, in contrast, gives rise to no independent cause of action for attorneys' fees or other sanctions. *See, e.g., Port Drum Co. v. Umphrey*, 852 F.2d 148, 149-50 (5th Cir. 1988). Consequently, at least one circuit that does not permit Rule 11 sanctions to be awarded after entry of judgment does allow post-judgment fee awards under Section 1927. *Compare Obin v. District No. 9, Int'l Ass'n of Machinists & Aerospace Workers*, 651 F.2d 574, 582 (8th Cir. 1981) (allowing post-judgment award of § 1927 sanctions) *with Adduono v. World Hockey Ass'n*, 824 F.2d 617, 620 (8th Cir. 1987) (precluding post-judgment award of Rule 11 sanctions).

3 Similarly, the court and the client of the offending plaintiff's lawyer also have remedies independent of Rule 11. The court may refer the matter of counsel's misconduct to local disciplinary authorities before or after a dismissal has occurred. *See, e.g., McGoldrick Oil Co. v. Campbell*, 793 F.2d 649, 653-54 (5th Cir. 1986); *Steinle v. Warren*, 765 F.2d 95, 101-02 (7th Cir. 1985). The client has a malpractice remedy.

C. Defendants Can Procedurally Protect Themselves Absent a Rule 11 Exception to Rule 41(a)(1)

The bright line test of Rule 41(a)(1) confers procedural power on both plaintiffs and defendants. The power conferred on plaintiffs is evident. They enjoy an unfettered right to withdraw their claims at an incipient stage of the litigation. But the power conferred on the defendant is no less apparent. The defendant alone can join issue and close the Rule 41(a)(1) exit at any time after a complaint is served. That is common strategy in many types of hectic, fast-moving cases, such as takeover litigation.

Nor is a defendant disadvantaged by filing an answer, as the present case illustrates. The respondent chose not to answer the complaint but instead to devote hundreds of hours to preparing a Rule 12(b)(6) motion to dismiss. It could just as well have filed a single page general denial together with a Rule 12(c) motion for judgment on the pleadings (identical in substance to the Rule 12(b)(6) motion it did file) and thereby foreclosed any resort by petitioner to Rule 41(a)(1). It was respondent's election not to join issue that raises the first issue before this Court.

The Rules thus afford defendants the ability to foreclose resort to Rule 41(a)(1) and to file dispositive motion papers at the outset of the litigation. A defendant's conscious election not to prevent use of the Rule 41(a)(1) alternative does not reflect any infirmity in the Rules that need be rectified by reading into Rule 41 an exception not contemplated by the drafters. If the marginal incremental effort required to interpose a general denial is viewed as spurring needless litigation or paperwork, this case is a testament to the magnitude of litigation and peperwork that the contrary rule produces.

Hays v. Sony Corp. of America, 847 F.2d 412, 418 (7th Cir. 1988) (because Rule 11 effectively "imposes a negligence standard," it therefore "defines a new form of legal malpractice"); *cf. Link v. Wabash R.R.*, 370 U.S. 626, 634 n. 10 (1962) ("if an attorney's conduct falls substantially below what is reasonable under the circumstances, the client's remedy is against the attorney in a suit for malpractice"). Consequently, there is no need to permit post-dismissal Rule 11 awards to vindicate either judicial processes or clients' rights.

D. Approval of Post-Dismissal Sanctions Will Necessarily Entail Allowing Post-Judgment Awards and Foster Piecemeal Appeals

If a district court has the power to impose Rule 11 sanctions after a case has been dismissed pursuant to Rule 41(a)(1), it would appear evident that the court retains the power to sanction after judgment has been entered. Rule 11 has been so construed by courts of appeals that adopt the reasoning of the court below. *See, e.g., Mary Ann Pensiero, Inc. v. Lingle*, 847 F.2d 90, 98 (3d Cir. 1988) (holding that district court retains jurisdiction to consider Rule 11 motions after notice of appeal has otherwise divested district court of jurisdiction); *Langham-Hill Petroleum, Inc. v. Southern Fuels Co.*, 813 F.2d 1327, 1330-31 (4th Cir. 1987), *cert. denied*, 484 U.S. 829 (1987) (same); *Hicks v. Southern Md. Health Sys. Agency*, 805 F.2d 1165, 1166-67 (4th Cir. 1986) (holding that district court has jurisdiction to consider Rule 11 motion made months after appellate proceedings have terminated); *In re Ruben*, 825 F.2d 977, 981-82 (6th Cir. 1987), *cert. denied*, 108 S.Ct. 1108 (1988) (holding district court had jurisdiction to consider sanctions motion filed 2-1/2 months after appeal dismissed for want of prosecution).

If post-dismissal and post-judgment sanctions may be imposed, there exists the very real prospect that multiple appeals will issue out of the same action. A judgment of dismissal entered on a Rule 12(b)(6) motion or a summary judgment entered pursuant to Rule 56 (including certified summary judgments under Rule 54(b)) will remain immediately appealable under 28 U.S.C. §§ 1291 and 1292(b). But the sanctions awards may—as the above-cited cases reflect—follow long after the first appeal is ripe, litigated and adjudicated. That result is virtually assured by the prevailing holding that a sanctions order does not become ripe for appeal until sanctions have been fixed, even if the Rule 11 violation has been judicially determined long before. *In re Jeannette Corp.*, 832 F.2d 43, 46 n. 2 (3d Cir. 1987); *Jensen Elec. Co. v. Moore, Caldwell, Rowland & Dodd, Inc.*, 873 F.2d 1327, 1329 (9th Cir. 1989). Consequently, if the Court is inclined toward affirmance in the

present case, it should consider certain procedural approaches that would tend to diminish the piecemeal appeal threat.

Local Rules. The multi-year delay between the filing of the instant respondent's Rule 11 motion and the district court's decision on the motion is extraordinary by any measure. This Court has previously urged that (1) local district court rules be promulgated to insure prompt filing of requests for attorneys' fees after judgment has been entered and (2) attorneys' fees requests (specifically, under the Civil Rights Attorneys' Fees Awards Act of 1974, 42 U.S.C. § 1988) be heard and decided shortly after entry of judgment. *White v. New Hampshire Dep't of Employment Security*, 455 U.S. 445, 454-55 & nn. 16-17 (1982). Many districts have attended to this Court's suggestion and adopted rules prescribing time periods within which attorneys' fees must be sought after judgment has been entered.[4] District courts should be directed to heed these rules in considering the timeliness of post-judgment Rule 11 motions for attorneys' fees.

Pre-Judgment Motion. Not all districts have promulgated local rules of this sort, however. In the absence of a local rule, a post-dismissal or post-judgment motion for sanctions could conceivably be made at a time quite remote from the actual offense.

To prevent this, the Third Circuit has adopted as a supervisory rule—binding on all courts in that circuit—a requirement

4 *See, e.g.*, S.D. Ala. R. 28(a)-(b); M.D. Ala. R. 20(a)-(b); D. Ala. Gen. R. 21.1; E.D. Ark. R. 27; W.D. Ark. R. 27(a)-(b) & (d); N.D. Cal. R. 270; E.D. Cal. R. 293(a); D. Del. R. 6.3; D.D.C. R. 215; N.D. Ga. R. 270; S.D. Ga. R. 11; D. Idaho R. 11-107(a); N.D. Ill. Gen. R. 46; N.D. Ind. R. 43; N.D. Iowa R. 2.9; S.D. Iowa R. 2.9; D. Kan. R. 220; E.D. Ky. R. 14(a); W.D. Ky. R. 14(a); D. Me. R. 32; D. Md. R. 234; D. Mass. R. 27; D. Minn. R. 6; N.D. Miss. R. 15(b)(1); S.D. Miss. R. 15(b)(1); D. Nev. R. 205-18; D.N.H. R. 39; D.N.M. R. 15(f); M.D.N.C. R. 210; E.D.N.C. R. 29.00, 29.01; D.N.D. R. 23(d); N.D. Okla. R. 6(f); W.D. Okla. R. 6(e); E.D. Okla. R. 6(f); D. Or. R. 265-4; W.D. Pa. R. 33; D. P.R. R. 332; D.R.I. R. 25(3); D.S.C. R. 16.00; M.D. Tenn. R. 13(e); W.D. Tex. R. 300-10; N.D. Tex. R. 12.2; E.D. Va. R. 11(L); E.D. Wis. R. 9. Five courts of appeals have adopted similar rules. *See* 3d Cir. R. 27(1); 5th Cir. R. 47.8; 6th Cir. Internal Op. R. 17; 8th Cir. R. 17; 9th Cir. Rs. 28-2.3 and 39-1.6.

that Rule 11 motions be filed in the district court before entry of a final judgment. *Mary Ann Pensiero, Inc. v. Lingle*, 847 F.2d 90 (3d Cir. 1988). The *Pensiero* Court reasoned that post-judgment or post-dismissal Rule 11 motions threaten to be post-appeal motions, and those are by definition administratively burdensome, and it stressed that "[t]he fragmented appeals arising in [cases before it] graphically illustrate the inefficiency resulting from delay in filing a sanction motion until after resolution of the merits appeal." The Court urged even earlier motion filings—"as soon as practicable after discovery of the Rule 11 violation." *Id.* at 99-100.

ATLA submits that, should this Court construe Rule 41(a)(1) as containing a Rule 11 exception, it should direct that Rule 11 applications be filed before judgment is entered or a dismissal effected, and that decisions be rendered promptly thereafter (e.g., within 30-90 days). This would eliminate the threat of piecemeal appeals and have the additional benefit of placing plaintiffs on notice of their exposure to Rule 11 sanctions. Since Rule 11 motions are themselves subject to Rule 11 and can only be made in circumstances which justify them,[5] the frequency with which such motions will be filed is likely to be limited and the burden on defendants quite modest.

II. THE ABUSE OF DISCRETION STANDARD, INCLUDING CAREFUL MONITORING OF LEGAL ERROR, SHOULD GOVERN REVIEW OF ALL ASPECTS OF A RULE 11 ORDER

There are currently three standards of review applied by the courts of appeals in Rule 11 cases. The abuse-of-discretion standard is most commonly employed. Six circuits—the First, Fourth, Fifth, Sixth, Seventh and Tenth—apply that standard to all aspects of a district court's Rule 11 order. *See, e.g., Kale v. Combined Ins. Co. of America*, 861 F.2d 746, 758 (1st Cir. 1988); *Rolleston v. Eldridge*, 848 F.2d 163, 165-66 (11th Cir. 1988); *Thomas v. Capital Sec. Serv., Inc.*, 836 F.2d 866, 872

5 *See, e.g., Local 106, Serv. Employees Int'l Union v. Homewood Mem. Gardens, Inc.*, 838 F.2d 958, 961 & n. 5 (7th Cir. 1988); *Townsend v. Holman Consulting Corp.*, 881 F.2d 788, 797 (9th Cir. 1989).

(5th Cir. 1988) (en banc); *Mihalik v. Pro Arts, Inc.*, 851 F.2d 790, 793 (6th Cir. 1988); *Mars Steel Corp. v. Continental Bank, N.A.*, 880 F.2d 928, 930 (7th Cir. 1989) (en banc); *Burkhart v. Kinsley Bank*, 852 F.2d 512, 515 & n. 3 (10th Cir. 1988).

Farthest removed from the abuse-of-discretion standard is the three-tiered standard developed by the Ninth Circuit in *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 828 (9th Cir. 1986). On reviewing a district court order imposing sanctions, the Ninth Circuit reviews (1) factual determinations under the clearly erroneous standard; (2) the legal conclusion that the facts constitute a violation of Rule 11 *de novo*; and (3) the appropriateness of the sanction imposed under the abuse-of-discretion standard. In addition to the Ninth Circuit, the Eighth Circuit applies this three-tiered standard of review. *EEOC v. Milavetz & Assocs., P.A.*, 863 F.2d 613, 614 (8th Cir. 1988).

Finally, four circuits, including the District of Columbia Circuit, have taken a hybrid approach, generally applying the abuse-of-discretion standard but reviewing issues of law *de novo*. *See, e.g., Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 254 n. 7 (2d Cir. 1985); *Snow Machines, Inc. v. Hedco, Inc.*, 838 F.2d 718, 725 (3d Cir. 1988); *Donaldson v. Clark*, 819 F.2d 1551, 1556 (11th Cir. 1987) (en banc); *Int'l Brotherhood of Teamsters (Airline Div.) v. Ass'n of Flight Attendants*, 864 F.2d 173, 176 (D.C. Cir. 1988).

Because of what may fairly be termed the prevailing lawlessness under Rule 11, the American Bar Association Section of Litigation developed and published a set of Standards and Guidelines for Practice Under Rule 11 of the Federal Rules of Civil Procedure, *see* 121 F.R.D. 101 (1988). The ABA standards endorse use of the abuse-of-discretion standard to review all aspects of a Rule 11 order—factual findings, legal conclusions and the appropriateness of the sanction imposed. *See* ABA Standard Q, 121 F.R.D. at 130. ATLA concurs in this judgment.[6]

6 Use of the clearly erroneous standard to review factual questions, while familiar to the courts of appeals, is inappropriate in Rule 11 cases because—unlike the situation envisaged by Rule 52—Rule 11 sanctions are almost always imposed in the absence of any evidentiary hearing, and they are frequently reviewed in the absence of any factual findings. While the courts of appeals insist that the record reflect the specific reasons for which a sanction is imposed and the basis on which the sanction rests, the degree of specificity required falls far short of that required by Rule 52. *See, e.g., Brown v. Fed'n of State Medical Bds.*, 830 F.2d 1429, 1438 (7th Cir. 1987); *Thomas*, 836 F.2d at 883; *INVST Financial Group, Inc. v. Chem-Nuclear Sys.*, 815 F.2d 391, 401 & n. 4 (6th Cir.), *cert. denied*, 484 U.S. 927 (1987).

It is crucial, however, that appeals court decisions serve what then-Circuit Judge Scalia in another context referred to as the dual purpose of appellate review—"the correction of legal error and the establishment of legal rules for future guidance." *Church of Scientology of Cal. v. IRS*, 792 F.2d 153, 155 n. 1 (D.C. Cir. 1986) (en banc), *aff'd*, 484 U.S. 9 (1987). The fundamental mandate of the courts of appeals is to consider and rectify errors of the trial courts. This mandate can be fulfilled, under the abuse-of-discretion standard, only as long as it is clear that a district court abuses its discretion if its conclusion rests on an incorrect legal standard. This is an uncontroversial proposition in the circuits,[7] and its endorsement by this Court in the Rule 11 context would be welcome.

III. RULE 11 CONFERS NO AUTHORITY TO IMPOSE SANCTIONS ON APPEAL

A. Under Traditional Rules of Statutory Construction, Rule 11 Defers to Section 1912 and Appellate Rule 38

Congress has enacted a statute specifically addressing the propriety of issuing sanctions on appeal, 28 U.S.C. § 1912. Section 1912 provides that, "[w]here a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay,

7 *See, e.g., Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp.*, 843 F.2d 808, 810 (4th Cir. 1988); *Parents, Ass'n of P.S. 16 v. Quinones*, 803 F.2d 1235, 1239 (2d Cir. 1986); *SEC v. Carter Hawley Hale Stores, Inc.*, 760 F.2d 945, 947 (9th Cir. 1985).

and single or double costs." Section 1912 traces its heritage to Act of Sept. 24, 1789, ch. 20, §§ 23, 25, 1 Stat. 85.

To codify judicial construction of this statute, this Court promulgated Appellate Rule 38, effective July 1, 1968, which provides that: "If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee." Appellate Rule 38 focuses not on "delay" (the statutory term) but on "frivolousness." In doing so, Appellate Rule 38 codifies the longstanding interpretation the courts had accorded Section 1912. *See* Adv. Com. Note to Fed. R. App. P. 38; *In re Midland United Co.*, 141 F.2d 692 at 692 (3d Cir. 1944); *Commercial Wholesalers, Inc. v. Investors Commercial Corp.*, 172 F.2d 800, 802 (9th cir. 1949); *see also LeFebvre v. Commissioner*, 830 F.2d 417, 418 (1st Cir. 1987). Section 1912 and Appellate Rule 38 are read *in pari materia*. *See, e.g., Natasha, Inc. v. Evita Marine Charters, Inc.*, 763 F.2d 468, 472 (1st Cir. 1985).

Like Section 1912, Appellate "Rule 38 adopts a case-by-case approach to identifying and deterring frivolous appeals. . . ." *Burlington Northern R.R. v. Woods*, 480 U.S. 1, 8 (1987). Unlike Rule 11, Section 1912 and Appellate Rule 38 do not mandate the imposition of sanctions, even if an appeal is frivolous and interposes delay. The imposition of sanctions always remains discretionary, not mandatory. Adv. Com. Note to Fed. R. App. P. 38; *Spiegel v. Continental Illinois Nat'l Bank*, 790 F.2d 638, 650-51 (7th Cir.), *cert. denied*, 479 U.S. 987 (1986).

If an award is granted pursuant to Section 1912 or Appellate Rule 38, it may, but need not, include attorneys' fees. Moreover, if attorneys' fees are included, the award may, but need not, reimburse all expenses incurred on appeal. It may consist of any sum that the court of appeals deems appropriate. *Braley v. Campbell*, 832 F.2d 1504, 1513-14 (10th Cir. 1987) (en banc); *United States v. Carley*, 783 F.2d 341, 344 (2d Cir.), *cert. denied*, 476 U.S. 1142 (1986); *Natasha, Inc.*, 763 F.2d at 472.

Under the decision below, the statute and appellate rule specifically addressing whether, and when, appellate sanctions may issue are superseded, not by another statute or appellate rule, but by a rule of civil procedure dealing generally with sanctions

in the district court. The decision below is erroneous, as a matter of statutory construction, for three independent reasons:

First, Rule 11 applies exclusively to district court proceedings. *See* Fed. R. Civ. P. 1 ("These rules govern the procedure in the United States district courts"); *cf.* Fed. R. Civ. P. 81 (circumscribing "Applicability in General") and 82 ("These rules shall not be construed to extend or limit the jurisdiction of the United States district courts"). Rule 11 has no application on appeal, where Section 1912 and Appellate Rule 38 set the framework for the issuance of sanctions. *See* Fed. R. App. P. 1 ("These rules govern procedure in appeals to United States courts of appeals from the United States district courts . . .").

Second, there is no evidence in the Advisory Committee Note or the Advisory Committee's publicly available working papers that Rule 11, a general sanctioning power adopted in 1983, was ever intended to apply to appellate proceedings, much less to supersede the previously-enacted Section 1912 or Appellate Rule 38.

> It is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum. "Where there is no clear intention otherwise, a specific statute will not be confronted or nullified by a general one, regardless of the priority of enactment."

Radzanower v. Touche, Ross & Co., 426 U.S. 148, 153 (1976) (citation omitted).

This Court has applied the foregoing principle to dispel other efforts to read particular Federal Rules of Civil Procedure as overriding particularized statutes governing cost-shifting in litigation. *See, e.g., Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 442-43 (1987) (holding that the specific witness fee and cost taxation provisions of 28 U.S.C. §§ 1821 and 1920 limit the broad, general cost provision contained in Rule 54(d)). The District of Columbia Circuit's reading of Rule 11 should fare no better.

Third, under this Court's decision in *Burlington Northern R.R. v. Woods*, 480 U.S. at 7, Rule 38's "discretionary mode

of operation unmistakably conflicts with the mandatory" compensation scheme read by the court below into Rule 11, and necessarily overrides it. In *Woods*, a diversity action, this Court held that Appellate Rule 38 superseded operation of a state sanctions provision mandating an award equal to 10% of the judgment in cases unsuccessfully appealed. This Court reasoned that the mandatory sanctions scheme of the state provision was irreconcilable with the discretionary approach taken by Appellate Rule 38, and that the purposes underlying the rule and state statute were "sufficiently co-extensive . . . to indicate that the Rule occupies the statute's field of operation so as to preclude its application in federal diversity actions." *Id.* at 7.

While the *Erie* implications of *Woods* are absent in the present case, the decision below does present an identical, irreconcilable conflict between (1) the "case-by-case approach to identifying and deterring frivolous appeals" (480 U.S. at 8) embodied in Appellate Rule 38 and Section 1912, and (2) the automatic-penalty approach comprising the lower court's construction of Rule 11. The courts of appeals are, and should be, reluctant to impose sanctions in marginal cases under Section 1912 and Appellate Rule 38. *See, e.g., Zarowitz v. BankAmerica Corp.*, 866 F.2d 1164, 1166 (9th Cir. 1989) ("Too exuberant use of sanctions could chill some meritorious appeals"). As a matter of statutory construction, this considered approach to appellate sanctions should not be overturned, particularly in the absence of any evidence of an intention by Rule 11's drafters to have this impact on the appellate process.

B. There Is No Need to Apply Rule 11 on Appeal

Section 1912 and Appellate Rule 38 provide the primary, but not the exclusive, remedy for misconduct on appeal. There exist at least four other, independent, discretionary sanctioning powers that appellate courts exercise to supplement (but not supplant) Section 1912 and Appellate Rule 38 in sanctioning misconduct on appeal. In view of this plethora of wholly consonant authorities, there is no need, just as there is no warrant, to construe Rule 11 as irreconcilably overriding the lot of them.

To begin with, 28 U.S.C. § 1927 is a penal statute that was enacted to deter unnecessary delay in litigation by requiring attorneys to satisfy personally excess costs attributable to their misconduct.[8] Section 1927 has consistently been held applicable to appellate misconduct. *See, e.g., Herzfeld & Stern v. Blair*, 769 F.2d 645, 647 (10th Cir. 1985); *In re Ginther*, 791 F.2d 1151, 1155-56 (5th Cir. 1986); *Reliance Ins. Co. v. Sweeney Corp.*, 792 F.2d 1137, 1138 (D.C. Cir. 1986). Like Section 1912 and Appellate Rule 38, Section 1927 authorizes the imposition of sanctions on a discretionary, not a mandatory basis. *See, e.g., Ford v. Temple Hosp.*, 790 F.2d 342, 347 (3d Cir. 1986); *In re Ruben*, 825 F.2d 977, 988 (6th Cir. 1987), *cert. denied*, 108 S.Ct. 1108 (1988). Further, while awards of attorneys' fees have been authorized under Section 1927 since its amendment in 1980 (Pub. L. No. 96-349, § 3, 94 Stat. 1154, 1156), the court decides how much (if any) to award. *Warren v. Reserve Fund, Inc.*, 728 F.2d 741, 748 (5th Cir. 1984); *Gelco Corp. v. Baker Indus., Inc.*, 779 F.2d 26, 28-29 (8th Cir. 1985).

The courts of appeals are also vested with the inherent power to issue sanctions for abusive litigation practices undertaken on appeal. *In re Kelly*, 841 F.2d 908, 917 (9th Cir. 1988). Somewhat akin to Section 1927, which is strictly construed because it is penal in nature,[9] inherent power sanctions are not broadly or liberally applied but "must be exercised with restraint and discretion." *Roadway Express, Inc. v. Piper*, 447 U.S. at 764.

Yet another sanctioning power available to the courts of appeals to penalize attorney misconduct is set forth in Fed. R. App. P. 46(c). Under Appellate Rule 46(c), a court of appeals may "take any appropriate disciplinary action against any attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with these rules or

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8 Like Section 1912, Section 1927 traces its antecedents to early in the history of the United States. *See* 26 Annals of Cong. 29 (1813). The history of Section 1927 is examined in detail in *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 759-60 (1980).

9 *Braley v. Campbell*, 832 F.2d at 1512; *Smith v. Detroit Fed'n of Teachers*, 829 F.2d 1370, 1378-79 (6th Cir. 1987); *Hagerty v. Succession of Clement*, 749 F.2d 217, 222 (5th Cir. 1984), *cert. denied*, 474 U.S. 968 (1985).

any rule of the court." In the discretion of the court, that action may include a monetary sanction. *See, e.g., United States v. Stillwell*, 810 F.2d 135, 136 (7th Cir. 1987).

Finally, most of the courts of appeals have adopted local rules pursuant to which they may impose sanctions for filing frivolous papers on appeal.[10] These courts include the court below. District of Columbia Circuit Rule 23 provides that, "[w]hen any party to a proceeding before this Court . . . takes an appeal or files a petition or motion that is frivolous or interposed for any improper purpose, . . . the Court may . . . impose appropriate sanctions on the offending party, the attorney or both." Citing Appellate Rule 38 and Sections 1912 and 1927, D.C. Cir. R. 23 further provides that sanctions may include, *inter alia*, "expenses and attorneys' fees."

In light of the existence of no less than six separate powers under which appellate misconduct can appropriately be sanctioned—all of which are discretionary in nature, consistent with Section 1912 and Appellate Rule 38—it is unnecessary to extend the reach the Rule 11 to appellate proceedings. *Cf. Societe Internationale v. Rogers*, 357 U.S. 197, 207 (1958) (declining to hold that Rule 41(b) empowers the district courts to dismiss a complaint as a sanction for a plaintiff's failure to comply with a discovery order; "[t]here is no need to resort to Rule 41(b), which appears in that part of the Rules concerned with trials and which lacks . . . specific references to discovery. . . . Reliance upon Rule 41, which cannot easily be interpreted to afford a court more expansive powers than does Rule 37, . . . can only obscure analysis of the problem before us").

10 *See* 1st Cir. R. 30.8; 2d Cir. R. 38 and 2d Cir. Civ. App. Mgmt. Plan R. 7; 3d Cir. R. 20(4); 4th Cir. R. 30; 5th Cir. R. 42.2; 6th Cir. R. 11(l); 8th Cir. R. 16(e); 11th Cir. R. 42-2; and D.C. Cir. R. 23.

C. To Construe Rule 11 As Mandating Fee-Shifting on Appeal Would Violate the Rules Enabling Act

In enacting the first two sentences of the Rules Enabling Act, 28 U.S.C. § 2072,[11] Congress's purpose was to allocate lawmaking power between itself and this Court, as rule maker. *See generally* Burbank, *The Rules Enabling Act of 1934*, 130 *U. Pa. L. Rev.* 1015, 1025-26, 1123 (1982). The purpose of the procedure/substance dichotomy set forth in this statute is to allocate policy choices—to determine which federal lawmaking body, this Court or Congress, is to decide whether certain rights should exist and, if so, the content of those rights. *Id.* at 1113.

This Court has repeatedly stressed that, except within very narrow parameters, attorneys' fee shifting in contravention of the American Rule[12] is a matter within the power of Congress and not a matter to be judicially determined. *See generally Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 259-60 (1975) (recognizing that Congress has not "extended any roving authority to the Judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted"). As this Court observed in *Alyeska:*

> [T]he circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are *matters for Congress to determine*. . . .
>
> [The American Rule] is deeply rooted in our history and in Congressional policy; and *it is not for us to invade the legislature's province by redistributing litigation costs* in the manner suggested by respondents and followed by the Court of Appeals [in awarding attorneys' fees to plaintiffs

11 "[T]he Supreme Court of the United States shall have the power to prescribe, by general rules . . . the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant." Act of June 19, 1934, Pub. L. No. 73-415, § 1, 48 Stat. 1064.

12 "[A]ttorney's fees are ordinarily not among the costs that a winning party may recover." *Roadway Express, Inc.*, 447 U.S. at 759.

"for having performed the functions of a private Attorney General" absent any statutory authorization].

Id. at 262, 271 (emphasis added).

The decision of the court below changes the standard under which attorneys' fees are awardable on appeal—from one of discretion in the context of a frivolous appeal to one mandating a particular sanction even if the appeal is not frivolous. Congress, however, has identified the choice of standards for imposing fee-shifting sanctions as a matter of specific concern to it. Specifically, when it amended Section 1927 in 1980 to permit awards of attorneys' fees, Congress expressly declined to alter the discretionary, bad faith standard then existing under Section 1927 because it wanted to "insure that the provision will in no way dampen the legitimate zeal of an attorney in representing his client." 1980 U.S. Code Cong. & Admin. News at 2781-82, *quoting* H.R. Conf. Rep. No. 96-1234, 96th Cong., 2d Sess. 8-9 (1980). In fact, the House conferees refused to accept a more liberalized Senate standard which would have permitted (but not required) fee-shifting upon a finding that the offending attorney had "intentionally engage[d] in conduct unreasonably and primarily for the purpose of delaying or increasing the cost of the litigation."[13] The House feared that the more liberal Senate standard "would have lowered the standard of dilatory conduct necessary to make out a violation and would have done so to such an extent that . . . the legitimate zeal of attorneys representing their clients would have been chilled."[14] It is for Congress to make dramatic changes in fee-shifting laws, and it has declined to do so.

Importantly, this Court recognized that laws affording rights to attorneys' fees may be substantive for *Erie* purposes in the *Alyeska* decision. 421 U.S. at 259 n. 31. Concededly, the standards for determining what is substantive for *Erie* and for Rules Enabling Act purposes are not identical. *Erie* rests on considerations of federalism, while the Rules Enabling Act rests on the separation of powers doctrine. However, in light of this Court's historical reticence to mandate attorneys' fee-shifting other than as statutorily permitted or historically recognized, the considerations underlying the conclusion in *Alyeska* are equally compelling for Rules Enabling Act purposes. Stated another way, substantive rights are enlarged when they are created for the first time in court decisions, especially in areas historically subject to Congressional prerogative. The decision below runs afoul of the Rules Enabling Act to the extent it mandates fees on appeal and should be reversed for that reason.[15]

13 S. 390, 96th Cong., 1st Sess., § 4 (1979), 125 *Cong. Rec.* 19,916 (1979). *See also* S. Rep. No. 238, 96th Cong., 1st Sess., 2-3, 9-10 (1979).

14 126 *Cong. Rec.* H8048 (daily ed. Aug. 28, 1980). *See also id.* at H8047. *See generally* Burbank, *Sanctions in the Proposed Amendments to The Federal Rules of Civil Procedure: Some Questions About Power*, 11 *Hofstra L. Rev.* 997, 1003-04 (1983).

D. The Court of Appeals' Automatic Attorneys' Fee Analysis Misconstrues Rule 11

If Rule 11 did apply directly to the appellate process, it would not, by its terms, justify the decision of the court below. Rule 11 provides that a sanction is mandatory once a violation is found, but it does not mandate what that sanction must be. The Court of Appeals has construed the Rule not only as mandating a sanction on appeal (absent any appellate misconduct) but also as mandating a particular sanction, attorneys' fees. Rule 11 does not so provide, and to read the Rule in that fashion would lead to quite anomalous results.

Attorneys' fees are only one of many types of sanctions awarded by courts for violations of Rule 11. These sanctions

15 In *Burlington Northern, Inc. v. Woods*, this court held that the discretionary sanctions power of appellate Rule 38 is, for *Erie* purposes, procedural and not substantive. 480 U.S. at 8. Rule 38 also plainly falls within the parameters set by the Rules Enabling Act because its discretionary sanctions power is consistent with the discretionary approaches of Sections 1912 and 1927. *Burlington* did not address the validity, under the Rules Enabling Act, of an automatic mandatory fee-shifting provision such as Rule 11 as construed below. Importantly, the source of authority for Rule 11 itself, as cited in the 1983 Advisory Committee Note, is discretionary, not automatic or mandatory ("the equitable doctrine permitting the court to award expenses, including attorney's fees, to a litigant whose opponent acts in bad faith in instituting or conducting litigation [citing *Roadway Express*]").

range from simple reprimands and warnings,[16] to mandatory continuing legal education,[17] fines,[18] referrals to attorney disciplinary authorities,[19] preclusion, dismissal or default orders,[20] suspension or disbarment from practice[21] and injunctions precluding future access to the courts.[22] In many cases, district judges expressly refuse to award attorneys' fees to parties prevailing on Rule 11 motions, choosing instead one of these alternatives. Refusals to award fees have routinely been upheld on appeal. *See, e.g., Pony Express Courier Corp. of America v. Pony Express Delivery Serv.*, 872 F.2d 317, 319 (9th Cir. 1989) (rejecting appellant's argument that the district court abused its discretion by refusing to impose monetary sanctions after finding a Rule 11 violation).

Yet, under the decision of the court below, every district court sanctions order not awarding attorneys' fees will give rise to an automatic award of attorneys' fees on appeal if the lower court's decision is affirmed. This result is incongruous.

Rule 11 was never intended to dictate imposition of a particular sanction. It does not do so in district court and should not be construed as doing so in appellate court. It certainly does not mandate automatic imposition of attorneys' fees.

E. The Court of Appeals' Construction of Rule 11 is Manifestly Unfair

To read into Rule 11 a requirement of mandatory fee shifting upon affirmance of a sanctions award leads to unfair treatment of litigants in at least two respects.

16 *See, e.g., In re Kelly*, 808 F.2d 549, 552 (7th Cir. 1986).

17 *See, e.g., Stevens v. City of Brockton*, 676 F. Supp. 26, 27 (D. Mass. 1987).

18 *See, e.g., Cheek v. Doe*, 828 F.2d 395, 397 (7th Cir.), *cert. denied*, 484 U.S. 955 (1987).

19 *See, e.g., McGoldrick Oil Co. v. Campbell*, 793 F.2d 649, 653-54 (5th Cir. 1986).

20 *See, e.g., Gaiardo v. Ethyl Corp.*, 835 F.2d 479, 482 (3d Cir. 1987).

21 *See, e.g., Donaldson v. Clark*, 819 F.2d, 1551, 1557 n. 7 (11th Cir. 1987) (en banc).

22 *See, e.g., Cotner v. Hopkins*, 795 F.2d 900, 902-03 (10th Cir. 1986).

First, and most obviously, the threat of sanctions on appeal will serve to inhibit persons otherwise inclined to file non-frivolous appeals (i.e., appeals that are otherwise not sanctionable, under any of the other six sanctioning powers currently existing). In an area of law as clouded with uncertainty and ambiguity as Rule 11—an area which, in the American Bar Association Section of Litigation's words, is marked by "uneven application of Rule 11 by the courts," 121 F.R.D. at 104—discouraging appeals that would assist in remedying this situation is contrary to sound public policy.

Moreover, the impediments placed on potential appellants may effectively deny them use of appellate procedures, and in that fashion effectively deny them an opportunity to be heard. *Cf. Boddie v. Connecticut*, 401 U.S. 371, 377-378 (1971). This is peculiarly bad public policy in light of the frequency with which district court sanctions decisions are reversed, not merely because the sanctions are unwarranted, but because the legal positions viewed by the district courts as frivolous are determined by the courts of appeals to be substantively correct. *See, e.g., Trident Center v. Connecticut Gen. Life Ins. Co.*, 847 F.2d 564, 570 (9th Cir. 1988); *Kucel v. Walter E. Heller & Co.*, 813 F.2d 67, 74 (5th Cir. 1987); *Hudson v. Moore Business Forms, Inc.*, 836 F.2d 1156, 1163 (9th Cir. 1987).

Second, the rule articulated by the Court of Appeals discriminates unfairly between litigants in Rule 11 cases, regardless of whether those litigants have won or lost the Rule 11 motion. This discrimination is evident when it is realized that the Court of Appeals' holding dictates not only that fees be automatically awarded to parties who win affirmance of Rule 11 award motions, but equally requires that fees be awarded to parties who successfully appeal denials of Rule 11 sanction motions. The District of Columbia Circuit explicitly based its decision below on its earlier decision in *Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1179-80 (1985), in which it awarded the successful challenger of a denial of Rule 11 sanctions his appellate expenses. It did so on the same linguistic analysis, concluding that an appellant should be awarded its appellate expenses because they were "in court because of" the Rule 11 violation. *See* 875 F.2d at 897-98, quoting *Westmoreland*, 770 F.2d at

1179. The decision below "merely reaffirm[ed] *Westmoreland*'s premise that Rule 11 authorizes an appellee to recover the costs it incurs in a successful defense of a Rule 11 award." 875 F.2d at 898.

With this background, consider a common circumstance: a Rule 11 motion that is granted in part and denied in part. The party against whom sanctions have been assessed can appeal only at risk of paying his opponent's attorney's fees should he lose. His opponent, however, can appeal that portion of the order which denied Rule 11 sanctions, confident of winning his fees if he prevails and free of any risk of paying his opponent's fees if he loses. There is no sound basis for incentivizing appeals by parties who have unsuccessfully made Rule 11 motions and disincentivizing appeals by parties against whom sanctions have been lodged. Once the right of appeal has been granted, it should be available to all litigants on an equal and non-discriminatory basis. *Cf. Lindsey v. Normet*, 405 U.S. 56, 78-79 (1972).

CONCLUSION

For the reasons stated above, it is respectfully requested that the Court answer Issues No. 1 and 3 in the negative and Issue No. 2 in the affirmative, with the admonition and the clarification previously suggested.

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